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# Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace

Taylor Flynn\*

## I. INTRODUCTION

¶1 When I was invited to participate in this symposium, its topic—whether there should be religious exemptions to equal marriage statutes—initially struck me as a concession by religious objectors to same-sex marriage indicating that the gay rights battleground had shifted. Proponents proffer the exemptions as a compromise to protect religious liberty when equal marriage rights are achieved via popular support.<sup>1</sup> Closer examination, though, suggested that I should not be so sanguine about the compromise the exemptions purport to represent.

¶2 There are only a handful of states in which enactment of equal marriage statutes is possible in the foreseeable future,<sup>2</sup> yet the attention given to this topic has been widespread.<sup>3</sup> Of course, objectors validly can be concerned about what they view as an

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\*Taylor Flynn, Professor of Law, Western New England College School of Law. I am grateful for the comments of participants at the Workshop on Regulating Family, Sex, and Gender at the University of Chicago School of Law in response to an earlier version of this piece, and in particular would like to thank Mary Anne Case and Adam Samaha for their insights and suggestions.

<sup>1</sup> See, e.g., Marc Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL'Y 307, 307–8 (2010); see also Letter from Thomas C. Berg, Carl H. Esbeck, Robin Fretwell Wilson, & Richard W. Garnett to Christopher G. Donovan, Speaker of the Conn. House, on Religious Liberty Implications of Raised Bill 899 (Apr. 20, 2009) [hereinafter Religious Liberty Letter], available at <http://www.nationformarriage.org/atf/cf/%7B39D8B5C1-F9FE-48C0-ABE6-1029BA77854C%7D/Berg.etal.pdf>. Equal marriage rights have been achieved via statute, without the capacious exemptions proposed by exemption advocates, in New Hampshire and Vermont. See DOMAWatch.org, <http://www.domawatch.org/stateissues/index.html> (last visited Sept. 9, 2010).

<sup>2</sup> More than forty states and the federal government have either a statutory or constitutional provision prohibiting same-sex marriage. See DOMAWatch.org, *supra* note 1. Of those remaining, five states guarantee equal marriage. *Id.*

<sup>3</sup> This includes a book of collected works on the subject, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson eds., 2008) [hereinafter SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY], as well as recent events at high profile institutions nationwide, including: Harvard Law School, see Lambda at Harvard Law School, News Update, <http://harvardlambda.org/2010/03/news-update-329/> (last visited Sept. 9, 2010); UCLA School of Law, see The Williams Institute, 2009–2010 Events, <http://www.law.ucla.edu/williamsinstitute/programs/2009-10Events.html> (last visited Sept. 9, 2010); the Brookings Institute, see The Brookings Institute, Same Sex Marriage and Religious Liberty: A Reconciliation, [http://www.brookings.edu/events/2009/0313\\_marriage.aspx](http://www.brookings.edu/events/2009/0313_marriage.aspx) (last visited Sept. 9, 2010); and the *Journal of Law and Social Policy's* 2009 Symposium, “Same-Sex Marriage and Religious Accommodation: Determining the Role of the Legislature.” See also Peter Steinfelds, *Will Same-Sex Marriage Collide with Religious Liberty?*, N.Y. TIMES, June 10, 2006, at A11 (discussing the December 2005 conference at Becket Fund for Religious Liberty).

infringement on religious liberty, even if only possible in a few states. When I read the proposed exemption language, however, it became immediately clear that the proposal's reach is far more expansive than its proponents acknowledge. With one notable difference,<sup>4</sup> the proposed language for religious exemptions has been remarkably consistent. Edited here to demonstrate its outer reaches, the proposed statutory language is commonly the following: "No individual . . . shall be liable, penalized, or denied benefits under the laws of this state or any subdivision . . . including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government contracts or grants, or tax exempt status, for refusing to provide services . . . related to the solemnization of any marriage . . . or for refusing to treat as valid any marriage, where such providing . . . or treating as valid would cause such individuals . . . to violate their sincerely held religious beliefs."<sup>5</sup>

¶3 The proposed exemptions alarm me, not simply as a defender and beneficiary of same-sex marriage, but as someone who cares deeply about discrimination, including discrimination based on religious belief. Even proponents' framing of the issue is problematic. While there are conflicts between religious objectors and antidiscrimination laws, exemption proponents often present the issue in terms such as "Gay Rights versus Religious Freedom."<sup>6</sup> A fair implication of this rubric is that religion and same-sex orientation are somehow mutually exclusive. This common presentation of the issue ignores that many religious faiths support same-sex marriage as a matter of theology, that many gay people are members of religious faiths, and that many of us are strong supporters of religious liberty.

¶4 The proposed language is frequently presented as a modest compromise to protect religious liberty.<sup>7</sup> To the contrary, the statutory language operates by effectively eviscerating existing sexual orientation protections. In addition, while the exemptions' greatest impact may be on laws prohibiting sexual orientation discrimination, the exemptions similarly threaten state and local civil rights protections for classifications including race, sex, and even religion itself. The exemptions permit sincerely-held religious objections regardless of the class protected: by its terms, a Muslim florist could refuse to sell flowers to participants in a Jewish wedding; a caterer could refuse to provide services because the cleric officiating is a woman; a landlord could refuse to rent to a married couple who is inter-racial or interfaith.

<sup>4</sup> In a distinction that is arguably telling, the primary difference between academic and political proposals is that the former often includes a so-called "substantial hardship exception" to protect the rights of same-sex couples in limited circumstances, while language proposed in the political arena at times does not. Compare Stern, *supra* note 1, at 307–8 (discussing a substantial hardship exception), with Religious Liberty Letter, *supra* note 1, at 7–8 (lacking a discussion of a substantial hardship exception). The hardship exception is narrow, providing an exemption where "a party to the marriage is unable to obtain any similar services . . . elsewhere and . . . such inability . . . constitute a substantial hardship" and that "no government official may refuse to solemnize a marriage if another government official is unable or unwilling to do so. Stern, *supra* note 1, at 307–8.

<sup>5</sup> Stern, *supra* note 1, at 307.

<sup>6</sup> George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights versus Religious Freedom*, 95 KY. L.J. 553, 555 (2006–07).

<sup>7</sup> See, e.g., Robin Fretwell Wilson, *Insubstantial Burdens: The Case For Government Official Exemptions*, 5 NW. J.L. & SOC. POL'Y 318 (arguing that permitting government officials to refuse to fulfill duties for same-sex couples seeking marriage places an insubstantial burden on these couples where access to marriage is not blocked).

¶5 Public accommodations laws, including those prohibiting discrimination based on sexual orientation, impose costs on religious liberty. Religious objections to homosexuality are deeply meaningful to many; I do not doubt the sincerity of those beliefs. The long-delayed recognition of equal marriage rights likewise has imposed and continues to impose costs on same-sex couples (such as those upon the couples and families denied protection, as well as the social cost of denied equality). A state's eventual extension of equal rights, particularly when combined with the fundamental nature of marriage, is bound to conflict with the religious beliefs of objectors.

¶6 Law is a balancing of interests. "Equality," *tout court*, does not resolve the conflict between religious objections and compliance with antidiscrimination laws, nor does injury to one's religious beliefs. In fact, a balance of these competing interests has largely been struck: a plethora of exemptions for religious belief are already in place, undermining the claim that such capacious exclusions are warranted.<sup>8</sup> For centuries, in a practice that continues into the present, religious freedom typically cedes to equality in the public realm, particularly with respect to commerce: the common law, which is the precursor to public accommodations statutes, has required common carriers to serve all who seek their services on reasonable and nondiscriminatory terms, despite claimed infringements on the seller's liberty.<sup>9</sup>

¶7 There is a reason those engaging in commerce generally are not permitted to choose whom to serve, even when service may conflict with the seller's religious beliefs; its locus is the intersection of equality and civil society. The imposition of a duty to serve all comers reflects the common law's determination that in a clash between a seller's asserted rights or beliefs and her provision of services to a willing buyer, the burden should fall on the seller who has placed herself in the public marketplace for commercial gain. As the Supreme Court of Mississippi recognized as early as 1873, "[a]mong those customs which we call the common law, that have come down to us from the remote past, are rules which have a special application to those who sustain a quasi public relation to the community."<sup>10</sup>

¶8 While exemption advocates proffer the exemptions in the name of balance, their scope and breadth is unprecedented. Although framed in terms of marriage and sexual orientation, the exemptions' reach extends far beyond both: they excuse compliance from fair housing laws, healthcare, education, adoption, employment, government contracts,

<sup>8</sup> For example, federal antidiscrimination statutes, such as Title VII of the Civil Rights Act, 42 U.S.C. § 2000e (2006), provide protection for religious belief, and while the compelling interest test under the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, was overturned in *City of Boerne v. Flores*, 521 U.S. 507 (1997), there is robust protection at the state level, with approximately one dozen states protecting religious belief through the statutory enactment of state religious freedom restoration acts, in addition to protection provided by some state constitutional amendments or state case law. See generally Kelleen Patricia Forlizzi, *State Religious Freedom Restoration Acts as a Solution to the Free Exercise Problem of Religiously Based Refusals to Administer Health Care*, 44 NEW ENG. L. REV. 387 (2010); James W. Wright Jr., *Making State Religious Freedom Restoration Amendments Effective*, 61 ALA. L. REV. 425 (2010). See also Home School Legal Defense Association, *State Religious Freedom Acts: Frequently Asked Questions*, <http://www.hsllda.org/docs/nche/000000/00000083.asp> (last visited Sept. 9, 2010); Posting of Derek Gaubatz to The Mail Archive, <http://www.mail-archive.com/religionlaw@lists.ucla.edu/msg02033.html> (Feb. 28, 2005, 9: 25 EST).

<sup>9</sup> A thorough review of the history of the common law's "common carrier duty" as the predecessor to public accommodations statutes, as well as its relationship to the enactment of the 13th–15th amendments to the Constitution, may be found in *Bell v. Maryland*, 378 U.S. 226, 289–309 (1964).

<sup>10</sup> *Bell*, 378 U.S. at 298 (quoting *Donnell v. State*, 48 Miss. 661, 680–81 (1873)).

licensing, grants, tax-exempt status, and anywhere else that public accommodations laws apply. In addition, they permit sincerely-held religious objections based on any protected classification, including race, sex, sexual orientation, and religion. Individuals, in effect, would be required to conform their lives to others' religious beliefs as a condition of their equal participation in the marketplace.

¶9 Upon reflection, it is unsurprising that exemption advocates offer a proposal that facially applies to all protected classes, rather than urging a codified “gay-exception” to equal marriage laws. As a pragmatic matter, equal marriage statutes will be possible only in a state in which citizens are supportive of gay rights: a suggestion by proponents to single out gay people for discrimination would likely be politically infeasible. A “gay-only” exemption, moreover, could strengthen a gay rights challenge on the ground that the exemption reflects animus.<sup>11</sup>

¶10 Given the unfortunate history of religious persecution, as well as American constitutional concern for preserving religious liberty, advocates' broad-based claim of religious injury has understandable resonance. For proponents to present this as a claim that pits the need for religious protection against other statutorily protected statuses (such as race, sex, and sexual orientation) has undoubted purchase—often disparagingly referred to as that of “competing victimhoods.”<sup>12</sup>

¶11 The phrase “competing victimhoods” commonly is used depreciatingly to imply competition among minority groups, in which each (as is frequently implied, perhaps unjustifiably) complains about (and again, as is frequently implied, perhaps magnifies) its injuries to receive a greater share of some perceived allotment of social goods (whether material goods or for political or social gain).<sup>13</sup> In short, the phrase conjures a negative image of fighting among minority groups over their share of a presumed “special rights” pie.<sup>14</sup> Despite the phrase's derisive slant, it captures an important concept within social movements. Identity-based groups, whether religious objectors to homosexuality or gay rights advocates, typically view their identity as in some way inseverable from the group's expression of dissent from majority norms—dissent that results in marginalization (or, more dismissively, “victimization”).<sup>15</sup>

<sup>11</sup> See *Romer v. Evans*, 517 U.S. 620 (1996) (striking a state constitutional amendment prohibiting sexual orientation nondiscrimination protections on the ground, *inter alia*, that removing a vast array of protections from a narrowly targeted, unpopular minority constituted an animus-based enactment in violation of equal protection). As discussed *infra* at Part III, while the demarcation distinguishing animus from permissible moral or religious belief is hotly contested, the imprimatur of the state in designating a vulnerable minority for disfavor by denying them widespread legal protection may be susceptible to a finding of animus.

<sup>12</sup> For uses of the term “competing victimhoods” with respect to religious identity, see, for example, Jordan Elgrably, *In Your Faith: Many Jewish Gen Xers are Embracing their Religion and Cultural Icons with Defiance and Bold Irony*, L.A. TIMES, May 13, 1996, at Life & Style 1 (“America has entered into an age of competing victimhoods. . . . The energy that used to go into trying to create a . . . more just society has been rerouted into competing claims of ethnic rights.”); Jerrold M. Post, *Israelis and Palestinians need each other—as Enemies*, S.F. EXAMINER, Sept. 30, 1993, at A23 (“[T]he Israeli-Palestinian struggle can be looked on as a struggle of competing victimhoods.”).

<sup>13</sup> See, e.g., Elgrably, *supra* note 12, at Life & Style 1.

<sup>14</sup> Although he does not use the phrase “competing victimhoods,” Justice Scalia's “special rights” rhetoric exemplifies the underlying notion of a minority group seeking to exert assertedly disproportionate influence to gain unwarranted social goods. *Romer*, 517 U.S. at 637–45 (Scalia, J., dissenting) (describing antidiscrimination laws as, *inter alia*, “special rights” and “preferential treatment”).

<sup>15</sup> See, e.g., Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMP. POL. & CIV. RTS. L. REV. 465, 475–90 (2009) (discussing non-conforming

¶12 Religious objectors to homosexuality have as much right to claim marginalization as any other group: the ability of an identity-based group to express dissent is an essential component of democracy.<sup>16</sup> My complaint is not with religious objectors' increasingly high profile use of proclaimed marginalization,<sup>17</sup> as it is an effective organizing tool for social movements. Instead, I argue that exemption proponents significantly overestimate their asserted marginalization when the issue is same-sex marriage; I further argue that proponents significantly underestimate the likely damage to sexual orientation and other antidiscrimination protections.

¶13 Interestingly, even though the exemptions on their face apply to all protected classes, proponents discuss religious objections to homosexuality only.<sup>18</sup> I tend to agree that, as-applied, the exemptions are likely to primarily affect lesbians, bisexuals, and gay men, denying us protection with respect to the multitude of public transactions that make up day-to-day life. Both outcomes, though (whether facial or as-applied) have the same underlying flaw: their impact is to return to a long-since rejected religious view of the public marketplace, in which religion was a prevailing force behind the regulation of commercial law.<sup>19</sup>

¶14 As applied to sexual orientation, I am particularly troubled by proponents' efforts to characterize discrimination against gay persons as less damaging than discrimination based on paradigmatic classifications such as race or sex. Because many religious faiths teach that one should "love the sinner but hate the sin,"<sup>20</sup> exemption proponents have argued that such "conduct"-based discrimination creates no status-based harm to

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gender expression as dissent from majority norms); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1592 (2001) (describing "expressive identity" claims as equality-based challenges in which one's identity and dissent from majoritarian norms cannot easily be separated from a message).

<sup>16</sup> See, e.g., Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671, 1720 (2000) (arguing that when a member of a marginalized group asserts her right to be accepted within mainstream norms on an equal basis, that claim for equality is at once assimilative and an expression of dissent).

<sup>17</sup> Two decisions decided by the Supreme Court this past term concerned what could be characterized as claims of "victimization" by religious objectors to homosexuality. See *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010) (rejecting the argument by Christian Legal Society that the law school's sexual orientation nondiscrimination policy singled out religious beliefs); *Doe v. Reed*, No. 09-559, 2010 WL 2518466 (June 24, 2010) (upholding as a facial matter disclosure requirements challenged by "Protect Marriage Washington," a sponsor of a referendum to stop implementation of state domestic partners law, in which sponsor claimed threats and harassment if identities were disclosed). See also Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL'Y 260, 268 (2010) (asserting that equal marriage advocates in Maine "went after the social work license of a high school counselor after she appeared in a TV ad opposing same-sex marriage," and stating that "I never expected to live in an America where individuals could be threatened with a loss of their livelihood for expressing their position on marriage laws").

<sup>18</sup> The book of collected works on the subject, to which several participants of the *Journal of Law and Social Policy's* 2009 Symposium are contributors, solely addresses religious objections to same-sex marriage. See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 3.

<sup>19</sup> See, e.g., Dennis J. Callahan, *Medieval Church Norms and Fiduciary Duties in Partnership*, 26 CARDOZO L. REV. 215, 226 (2004) (noting that western commercial legal tradition originated during the 11<sup>th</sup> to the 13<sup>th</sup> centuries, when "the Roman Catholic Church was the predominant generator and enforcer of commercial law and the moral norms on which the pervasive regulation of the marketplace was based").

<sup>20</sup> As suggested by the following New York Times article, the duty to "love the sinner but hate the sin" has become socially recognized shorthand for religious objection to homosexual sexual conduct. See, e.g., Adam Nossiter, *Hate the Sin, Love the Sinner; A Wheeler-Dealer Minister Denies Homophobia*, N.Y. TIMES, Aug. 23, 1995, at B4.

personhood, and instead merely constitutes insult.<sup>21</sup> As an initial matter, proponents' argument ignores the myriad tangible goods that objectors may withhold, including housing or equal pay for equal work (as when a married gay employee is denied spousal health coverage). The law largely rejects the status-conduct distinction, and for good reason: a wide swath of discrimination (including that based on religion) would be exempt from liability under antidiscrimination laws, as conduct is frequently a proxy for status.<sup>22</sup>

¶15 To be candid, I find myself unnerved by proponents' failure to recognize the dignitary harm at the heart of public refusals to serve historically marginalized groups. Some advocates have gone so far as to suggest that, to alleviate the injury, business owners could post signs to warn gay persons that we may be refused service. Even if phrased to avoid reference to a sexual orientation-based denial (for example, by limiting services to "traditional marriages" or framing the exemption as a refusal to facilitate same-sex sexual activity), the effect is a status-based harm: "No gays served here." Such sign-posting is an embodiment of second-class citizenship; with the sanction of law, it bestows upon individuals the right to determine whom they will serve in the public realm.

¶16 Exemption proponents assert that religious objections under their proposal will be relatively rare.<sup>23</sup> I contend that objectors overstate support for same-sex marriage. While the exemptions presuppose sufficient support to enact an equal marriage statute, polls consistently show that support for same-sex marriage is the flashpoint in the gay rights debate.<sup>24</sup> "While Americans have become increasingly likely to believe that the law should not discriminate against gay individuals and gay couples," a Gallup poll commentator recently stated, "the public still seems reluctant at this point to extend those protections to the institution of marriage."<sup>25</sup> Indeed, not only has majority opposition to same-sex marriage continued unabated, opposition to same-sex marriage *increased* for several years after equal marriage first became a reality in the United States, taking a few years to bounce back to the earlier level of support.<sup>26</sup> A religious objector may or may

<sup>21</sup> See, e.g., Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOKLYN L. REV. 125, 126, 137 (2006) (religious objector's refusal to provide marriage-related services to gay persons is merely "insult"); see also Gallagher, *supra* note 17, at 270, 271 (characterizing harm of proposed exemptions as gay persons' "knowledge of civil and moral disagreement with the choices one has made" and describing proposals as a "critique").

<sup>22</sup> See generally *infra* Part III (B).

<sup>23</sup> See, e.g., Stern, *supra* note 1, at 308 ("[T]here are probably far fewer people around who would invoke such exemptions than is generally thought. And, given the poll data, there will be even fewer as older people move off the commercial scene."); Koppelman, *supra* note 21, at 132–35 (asserting that gay persons would rarely be refused services even under a broad exemption).

<sup>24</sup> As early as 2003, a Gallup poll showed that eighty-eight percent of Americans believed that gay people should have equal job opportunities. Lydia Saad, *Gay Rights Attitudes a Mixed Bag: Broad Support for Equal Job Rights, But Not for Gay Marriage*, GALLUP, May 20, 2005, <http://www.gallup.com/poll/16402/gay-rights-attitudes-mixed-bag.aspx>. In a 2009 Gallup poll, only forty percent of Americans reported in favor of legalizing same-sex marriage, while nearly three in four Americans, seventy-three percent, believe gay and lesbian domestic partners should have inheritance rights. See Jeffrey M. Jones, *Majority of Americans continue to Oppose Gay Marriage*, GALLUP, May 27, 2009, <http://www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx> (last visited Sept. 9, 2010).

<sup>25</sup> Jones, *supra* note 24.

<sup>26</sup> "The Massachusetts ruling legalizing same-sex marriage, *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), and the 2004 election campaign, coincided with a sharp, if relatively short term, disruption of the previous slow but steady decade long shift of opinion . . . . Support returned to 2003

not be a member of a religious minority; it is indisputable, however, that majority opposition to equal marriage is the nationwide norm.

¶17 I do not purport to account for the undoubtedly multi-faceted mix of components that form the basis for such heated opposition to same-sex marriage. As others have discussed, even an incomplete review of the anti-gay movement in the United States would suggest an amalgam that includes some amount of hostility, disgust, and fear of the transmissibility of homosexual sex,<sup>27</sup> combined with an anxiety or desire to protect what is believed to be the sanctity of heterosexual marriage.<sup>28</sup> As William Eskridge has recounted, the contemporary anti-gay movement has its roots in the 1970s “Save Our Children campaign,” which he describes as at once “aggressively negative, invoking themes of disgust and contagion, as well as surprisingly positive . . . identity arrayed around marriage and family.”<sup>29</sup> Such disgust and fear of transmission operate to naturalize inferiority—a mechanism long used to justify oppression of racial, ethnic, and religious minorities.<sup>30</sup> Eskridge characterizes current opposition to homosexuality as a “kinder, gentler” discourse, one that reflects a genuine decrease in virulence while remaining grounded in fear and disgust.<sup>31</sup>

¶18 In my view, some exemption proponents engage in Eskridge’s “kinder, gentler” discourse of disgust rather straightforwardly. George Dent, for instance, opens a recent article with the assertion that homosexuality is inherently disfavored and unnatural: “[D]isapproval of homosexuality is so widespread that it cannot be ascribed to theology. More likely, most people have an innate distaste for homosexuality.”<sup>32</sup> Dent’s statements, of course, cannot be attributed to others,<sup>33</sup> and I personally believe that many proponents, including Dent, are sincere and well-intentioned. Crucially, though, one can be sincerely well-intentioned and believe that gay people engage in unnatural behavior that marks us as congenitally inferior and a threat to heterosexual marriage.

¶19 While views of proponents may provide some insight, my primary concern rests with the exemption proposal itself. The exemption proposal is a strange beast: it is presented solely in the context of religious objections to homosexuality, yet is drafted to encompass all protected grounds; it is presented solely in terms of marriage, yet in reality extends to all forms of public accommodations and non-discrimination law imaginable.<sup>34</sup>

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levels in mid-2007 while opposition has only now, in May 2008, declined back to where it stood in mid-2003.” Charles Franklin, *Gay Marriage Support and Opposition* (May 21, 2008), [http://www.pollster.com/blogs/gay\\_marriage\\_support\\_and\\_oppos.php](http://www.pollster.com/blogs/gay_marriage_support_and_oppos.php).

<sup>27</sup> See, e.g., MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010) (applying philosophical and constitutional analyses to argue that disgust is a fundamental motivation of persons opposing gay rights); William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011 (2005).

<sup>28</sup> For a thorough examination of the argument that same-sex marriage threatens the institution of marriage, see generally WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE’VE LEARNED FROM THE EVIDENCE* (2006).

<sup>29</sup> Eskridge, *supra* note 27, at 1013.

<sup>30</sup> *Id.* at 1020 (citations omitted).

<sup>31</sup> *Id.* at 1062.

<sup>32</sup> Dent, *supra* note 6, at 555.

<sup>33</sup> Consider Chief Justice Marshall’s oft-repeated caution concerning attributing what he called “impure motives” to individual legislators, in which he asked, *inter alia*, “Must the vitiating cause operate on a majority, or on what number of the members?” *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 130 (1810).

<sup>34</sup> As discussed in Part II, the exemptions extend beyond marriage by applying to most transactions of daily life (such as housing, healthcare, and consumer purchases), as well as by applying whenever an objector believes that he or she would be treating the couple as validly married, which may or may not require an



There is a vast gulf between the exemptions' actual reach and proponents' claimed impact. This suggests a distressing possibility: that irrespective of how well-intentioned individual proponents may be, some may be harnessing fears, disgust, and anxiety surrounding same-sex marriage as a strategy to obtain state authorization to discriminate that otherwise would not garner sufficient legislative support.

¶20 In Part II, I examine the sweeping reach of the proposals and refute the assertion that equal marriage recognition will effect a widespread change in the law. In Part III, I critique the status-conduct elision, used by some proponents to argue that sexual orientation discrimination is less injurious than discrimination against other protected classes, such as race or sex. Furthermore, courts have long held that good intentions, including those religiously motivated, diminish neither the effect nor fact of discrimination. Lastly, in Part IV, I analyze two related arguments made by some proponents: that religious exemptions to equal marriage statutes simply present a Wechslerian clash of symmetrical associational rights; and a proposal to assertedly minimize the injury of a refusal to provide services by having objectors post signs informing same-sex couples we will be denied service in those establishments. I conclude that in both instances the state would not be merely facilitating associational rights, but instead would be overlaying a network of "gay-only" licenses to discriminate onto existing antidiscrimination protections.

## II. THE SWEEP OF THE PROPOSED EXEMPTIONS

¶21 As discussed in Part I, the proposed language for religious exemptions is commonly the following: "No individual . . . shall be liable, penalized, or denied benefits under the laws of this state or any subdivision . . . including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government contracts or grants, or tax exempt status, for refusing to provide services . . . related to the solemnization of any marriage . . . or for refusing to treat as valid any marriage, where such providing . . . or treating as valid would cause such individuals . . . to violate their sincerely held religious beliefs."<sup>35</sup>

### A. *Vagueness and Other Interpretive Challenges*

¶22 The proposal's language is vague, which could result in a range of potential outcomes, from those that are somewhat cabined to those that are far-reaching. While a detailed analysis of potential outcomes is beyond the scope of this article, I mention a few interpretive difficulties and then focus on the most troubling possibilities, which are those with the broadest reach. First, consider the clause, "refusing to provide services . . . related to the solemnization of any marriage."<sup>36</sup> Given that rings typically are a part of the solemnization of marriage, this exception could be read, for example, as permitting a jewelry store owner to refuse to sell rings to a same-sex couple. As discussed above, I would object to this outcome, as it violates the principle, in place since early American common law, that those serving the public have a duty to serve all comers.<sup>37</sup>

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actual legal marriage. *See generally infra* Part II.A–B.

<sup>35</sup> Stern, *supra* note 1, at 307.

<sup>36</sup> *Id.*

<sup>37</sup> Callahan, *supra* note 18, at 226.

¶23 Despite the vagueness concerning what constitutes “solemnization,” the solemnization clause suggests some limits on its reach—whatever a court determines is “related to”<sup>38</sup> solemnization. The “treatment clause,” in contrast, permits an objector to “refus[e] to treat as valid any marriage . . . where such . . . treating as valid would cause that individual . . . [or] corporation to violate their sincerely held religious beliefs.”<sup>39</sup> This clause raises a host of interpretive difficulties, for which the answers are unclear. What constitutes treating a marriage as valid? Can a corporation hold a sincerely-held religious belief, and if so, does this apply equally to a small family business as well as a Fortune 500 company? Is a legal, same-sex marriage a prerequisite to claim an exemption? If not, is it sufficient that the person seeking services holds herself out as part of a same-sex couple, from which the objector might infer a marriage? What if the person seeking services is openly gay, and from that the objector sincerely believes that by providing him or her services the objector would be facilitating the sin of same-sex marriage? Or, conversely, is the “treatment” clause limited to the provision of services that turn on the fact of a couple’s marriage, such as employee benefits or hospital visitation?

¶24 The scope of the proposed exemptions thus range from a fairly circumscribed set of possible applications, on one hand, to authorization to engage in widespread status-based discrimination, on the other. That the latter is a plausible interpretation worries me: it suggests that what is often presented as a modest proposal to protect religious liberty reflects in actuality a larger goal to effectively eviscerate existing sexual orientation nondiscrimination protections.

#### *B. Beyond Same-Sex Marriage: Objections Based on Race, Sex, and Religion*

¶25 While some of the above questions suggest limitations on the proposal’s reach, the proposed language on its face appears to permit far-reaching exemptions with respect to the prohibited grounds for discrimination. My queries immediately above—like the examples given by exemption advocates<sup>40</sup>—presume objection to a same-sex marriage. Significantly, however, there is no such textual limitation: the proposed language applies when compliance with any of the antidiscrimination laws would “cause such individuals . . . to violate their sincerely held religious beliefs.”<sup>41</sup> This would exempt an objector from compliance with respect to nondiscrimination laws applying to any protected class, including, but not limited to, discrimination based on sexual orientation, sex, race, and religion itself.

¶26 Given longstanding, deep-seated, and at times violent clashes among various religions based on theological, cultural, and historical conflicts, there is strong reason to expect a significant volume of claimed exemptions based on religious discrimination.<sup>42</sup>

<sup>38</sup> Stern, *supra* note 1, at 307.

<sup>39</sup> *Id.*

<sup>40</sup> See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 3.

<sup>41</sup> Stern, *supra* note 1, at 307.

<sup>42</sup> In an official church document released in 2004, for instance, Vatican officials discouraged marriage between Catholics and Muslims—especially Catholic women and Muslim men. Alan Feuer, *Vatican Discourages Marriage With Muslims for Catholic Women*, N.Y. TIMES, May 15, 2004, at A2. Interfaith marriage is generally opposed by Muslims, although Muslim men are permitted to marry women of other faiths. See William V. Harris et al., *In the Eyes of God: How Attachment Theory Informs Historical and Contemporary Marriage and Religious Practices among Abrahamic Faiths*, 39 J. COMP. FAM. STUDIES 259

So, too, with respect to sex: there is heated debate regarding issues such as women serving as clergy, and segregation from men in places of worship.<sup>43</sup> With respect to race, some may object that such refusals are unlikely, since mainstream religious traditions do not oppose interracial marriage. However, given the existence of contemporary white supremacist sects with a racialized theology, as well as the relatively recent acceptance of interracial marriages by many mainstream religions, the likelihood of race-based claims cannot be disregarded.<sup>44</sup> Regarding sexual orientation, although proponents opine that requests for allowances will be rare, current laws and attitudes toward same-sex marriage belie that prediction. For example, there is far greater support for equal treatment of gay persons in the workplace than for same-sex marriage,<sup>45</sup> yet despite that support, lesbians and gay men nonetheless can be fired in more than half of the United States simply for being gay.<sup>46</sup> The persistent and widespread disapproval of same-sex marriage suggests that, even in a state that enacts an equal marriage statute, the number of persons asserting exemptions is likely to be substantial.<sup>47</sup>

¶27 Taken at face value, then, the proposed exemptions subject individuals to the risk of discrimination based on any classification protected by the state, including race, sex, sexual orientation, and religious belief. In essence, such capacious exclusions convey that those most vulnerable to discrimination with respect to marriage should either conform or risk discrimination in the public marketplace. Given the myriad of sincerely-held religious beliefs concerning who may or may not marry whom, antidiscrimination laws could not function effectively in our religiously pluralistic society.

¶28 Concerning the range of antidiscrimination laws at issue, the proposed language would exclude religious objectors from compliance with what the Supreme Court in *Romer v. Evans* described as protections “against exclusion from an almost limitless

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(2008). A poll taken in 2000 found that most American Jews accept marriages between Jews and non-Jews, a position contrary to that held by most rabbis, Orthodox and non-Orthodox. Gustav Niebuhr, *Marriage Issue Splits Jews, Poll Finds*, N.Y. TIMES, Oct. 31, 2000, at A25.

<sup>43</sup> For more information on inter- and intra-faith conflicts concerning the role of women in and among various religious traditions, see, for example, Rachel Donadio, *Anglican Leader Defends Faith as Vatican Welcomes His Members*, N.Y. TIMES, Nov. 20, 2009, at A4 (discussing new Anglican rite within the Roman Catholic Church aimed at Anglicans uncomfortable with the ordination of women and gay clergy members); Michael Luo, *An Orthodox Jewish Woman, And Soon, a Spiritual Leader*, N.Y. TIMES, Aug. 21, 2006, at B4 (reporting on a woman appointed as head of Orthodox congregation though not serving as a rabbi).

<sup>44</sup> For example, Bob Jones University did not end its ban on interracial dating until March 2000, and only then after its policy received widespread news coverage and criticism when George W. Bush spoke there during his 2000 presidential campaign. See Martha Minow, *Should Religious Groups be Exempt from Civil Rights Laws*, 48 B.C. L. REV. 781, 798–99 (2007). It was not until 1995 that the Southern Baptist Convention issued an apology for condoning racism from slavery through the Civil Rights era. Peter Steinfeld, *Beliefs*, N.Y. TIMES, Dec. 30, 1995, at A8. For more information on the rise of the Christian Identity movement, which holds a white supremacist theology, in the United States during the 1980s and 1990s, see generally MICHAEL BARKUN, *RELIGION AND THE RACIST RIGHT: THE ORIGINS OF THE CHRISTIAN IDENTITY MOVEMENT* (1996).

<sup>45</sup> See discussion *supra* note 27.

<sup>46</sup> See, e.g., Lambda Legal, *Employment and Rights in the Workplace*, <http://www.lambdalegal.org/issues/employment-workplace/> (last visited Sept. 9, 2010) (describing that fewer than half of the states specifically prohibit sexual orientation discrimination in private employment).

<sup>47</sup> A Gallup poll released in May 2009 found that fifty-seven percent of Americans were opposed to same-sex marriage; the poll noted that, in recent years, support for equal marriage has appeared to stall, peaking at forty-six percent in 2007. Jeffrey Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP, May 27, 2009, <http://www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx>.

number of transactions and endeavors that constitute civic life in a free society.”<sup>48</sup> The expanse of the exemptions is made apparent by the language itself, which runs the gamut of contexts in which clashes are likely to appear, set forth as an illustrative, non-exhaustive list: the exemptions apply to all nondiscrimination prohibitions “under the laws of this state or any subdivision . . . including but not limited to laws regarding employment discrimination, housing, public accommodations, licensing, government contracts or grants, or tax exempt status.”<sup>49</sup> The proposed exemptions touch every aspect of commercial transactions involved in public and private life, including excusing compliance with the full range of antidiscrimination laws, as well as any area in which the government offers services, grants, contracts, licenses, or tax-exempt status. These exemptions include crucial services central to daily life, such as employment, housing, healthcare, adoption, and education. They also extend to many governmentally-provided (and tax-payer supported) benefits and services. Likewise, release from accountability reaches non-discrimination agreements signed as a condition of receiving government contracts, similar requirements for persons licensed to practice by the state, and tax-exempt status for agreements to provide equal access to members of the public.

¶29 In the academic literature, some proponents have included a narrowly-framed hardship exception related to the solemnization and/or licensing of marriage, over which the state holds a monopoly.<sup>50</sup> Commentator Robin Fretwell Wilson argues that the hardship exception protects religious liberty without harm because it does not block same-sex couples’ access to marriage.<sup>51</sup> The hardship exception misses (much of) the point. The injury to persons refused service extends beyond denial of a marriage license. No exemption is provided, for example, for refusals to rent an apartment to a same-sex couple or the refusal to provide spousal healthcare benefits. In addition, the hardship exemption fails to account for the primary harm of a refusal to serve—the dignitary and equality harm inherent in discrimination against a historically vulnerable minority.

¶30 Finally, even the subject matter of the proposal is open to question. As discussed above, exemptions apply not only to the solemnization of marriage, but also extend to refusals to “treat as valid” any marriage when to do so “would cause such individuals . . . to violate their sincerely held religious beliefs.”<sup>52</sup> Crucially, the language suggests that the determination of what constitutes “treating [a marriage] as valid” is determined by the subjective belief of the objector. The emphasis on “treating” a marriage as valid makes it unclear whether a legal marriage is a prerequisite for a religious objector to invoke an exemption. What if the person seeking services holds herself out as part of a lesbian couple, and from that the religious objector sincerely believes he or she will be facilitating the sin of same-sex marriage?

¶31 Of course, at some point an objection may be so far removed from an objective standpoint that a court could find that a particular belief is not sincerely held. A determination of what is too far removed to constitute a sincerely held religious belief, however, is difficult to make. Consider, for instance, an employer’s decision to fire an employee who brings his husband to the office’s annual holiday party, for which the

<sup>48</sup> 517 U.S. 620, 631 (1996).

<sup>49</sup> See Stern, *supra* note 1, at 307.

<sup>50</sup> *Id.*

<sup>51</sup> Wilson, *supra* note 7, at 323.

<sup>52</sup> Stern, *supra* note 1, at 307.

invitation states, “Spouses invited.” In my view, this would not qualify as an exemption under the proposed language, as I believe there is an insufficient nexus between accepting the couple’s presence at a holiday party to constitute causing the employer to “treat [their marriage] as valid”; it is possible, however, particularly based on the sincerity of the employer’s belief, that a court could find this exemption to be valid.

### C. *No Sea Change or Flood*

¶32 The proposals are not only astonishingly broad but are also unnecessary. Proponents attempt to justify the wide-ranging license to discriminate with the assertion that the impact of equal marriage statutes will be enormous—working, as one commentator warns, “a sea change in American law . . . [t]hat will reverberate across the legal and religious landscape.”<sup>53</sup> Advocates forecast a flood of new litigation against individuals, small businesses, religious organizations (such as churches, mosques, or temples), and religious non-profits; in addition, some raise fears of curricular changes and limits on expressive rights in public schools.<sup>54</sup> Proponent Maggie Gallagher, for instance, describes equal marriage laws as an “equality right on steroids,” “posing a new threat to religious liberty, and liberty of conscience generally.”<sup>55</sup>

¶33 My argument is *not*—to use the dreaded double negative—that equal marriage statutes pose no harm to religious liberty. My point is that there will *not* be a dramatic increase in the volume of cases filed. To bolster their claim that exemptions for religious belief are necessary, proponents point to examples such as the decision of Catholic Charities in Boston to stop offering adoption services, the Ocean Grove Pavilion in New Jersey, which forfeited its public-access tax exemption, and governmental limits on the provision of state-owned facilities and fora to the Boy Scouts.<sup>56</sup> Another commonly raised fear is in the area of housing—that same-sex marriage laws will increase the number of landlords or religiously-affiliated universities who will be required to rent to same-sex couples.<sup>57</sup> An additional oft-cited example is the ability of healthcare providers, such as doctors in fertility clinics, to refuse services to same-sex couples.<sup>58</sup>

¶34 Such clashes do exist. What proponents overlook, however is that the clashes they cite, such as those above, typically do not involve marriage at all. In fact, I was unable to find a single example cited by proponents that involved a religious objection to a legal, same-sex marriage. With rare exception, the examples put forth by proponents take place in states that do not permit same-sex marriage, pre-date the legalization of same-sex marriage, or otherwise do not involve marriage.<sup>59</sup> While not a large state, Massachusetts

<sup>53</sup> Marc D. Stern, *Same-Sex Marriage and the Churches*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 3, at 1 [hereinafter Stern, *Same-Sex Marriage and the Churches*].

<sup>54</sup> For an overview of examples that objectors to same-sex marriage claim will result if equal marriage rights are recognized, see Brief for the Becket Fund for Religious Liberty as Amici Curiae at 2–14, *Chambers v. Ormiston*, 916 A.2d 758 (R.I. 2007) (No. 06-340-M.P.) [hereinafter Becket Fund Amicus Brief]. See also Stern, *Same-Sex Marriage and the Churches*, *supra* note 53, at 7–52; see generally Religious Liberty Letter, *supra* note 2.

<sup>55</sup> Gallagher, *supra* note 17, at 270.

<sup>56</sup> See, e.g., Becket Fund Amicus Brief, *supra* note 54, at 2–8, 10–13.

<sup>57</sup> See, e.g., *id.* at 4–5; Stern, *Same-Sex Marriage and the Churches*, *supra* at note 53, at 33–44.

<sup>58</sup> See, e.g., Dent, *supra* note 6, at 569–70.

<sup>59</sup> For a concise explanation of the ways in which equal marriage opponents’ examples have nothing to do with the recognition of equal marriage rights, see Brief for Religious Organizations & Clergy as Amici Curiae at 5–12, *Chambers v. Ormiston*, 916 A.2d 758 (R.I. 2007) (No. 06-340-M.P.).

has recognized equal marriage rights since 2004, and four other jurisdictions have since followed suit.<sup>60</sup> The lack of religious objections involving equal marriage recognition or the provision of services for same-sex marriages during the past six years seriously undercuts proponents' claim of a flood of additional litigation.

¶35 To the contrary, the examples invoked by exemption proponents are proof that such conflicts have been occurring for decades, long before same-sex couples could marry. Objectors have long refused to facilitate what they believe to be the immoral conduct of gay people, and these objections have not depended on the legal status of same-sex marriage. In most instances the religious objector's basis for non-compliance will not be marital status *in se* (i.e., "I object to providing services to all married [or unmarried] persons, regardless of sexual orientation"), but instead is the sub-group of married persons defined by sexual orientation.

¶36 Proponents' real complaints lie with the status quo—their actual source of disagreement is with antidiscrimination, fair housing, and public accommodations laws, rather than marriage laws. To be sure, advocates are free to object to the existing balance between nondiscrimination laws and religious liberty, and to argue that it should be weighted differently. But that is not what proponents are arguing: instead, they argue that equal marriage rights will create a sea change in the law, necessitating correspondingly expansive protections for religious liberty.<sup>61</sup> My concern is that some proponents appear to be seizing on the highly-charged issue of same-sex marriage as a vehicle or possible pretext, in order to dramatically curtail existing sexual orientation protections.

### III. LOVE THE SINNER, HATE THE SIN: ANIMUS, RELIGIOUS BELIEF, AND BENEVOLENT INTENT

¶37 A white Louisiana Justice of the Peace, Keith Bardwell, recently refused to marry an interracial couple.<sup>62</sup> I raise the Bardwell incident not to suggest that such refusals will be common—in fact, religious belief was not the basis of his refusal, though such an exception from liability is possible under exemption advocates' proposed language.<sup>63</sup> Instead, I raise it to make a milder observation: the media coverage of this incident rightfully presumed that Bardwell's refusal to marry the couple caused them extreme personal pain and injury.<sup>64</sup>

¶38 Some exemption proponents, in contrast, assert that religiously based refusals to marry a same-sex couple typically do not inflict a comparable harm to personhood. For example, while acknowledging that "much antigay animus is just like racism," Andrew

<sup>60</sup> Following the decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), same-sex marriage has been legal in Massachusetts since May 2004. See Pam Belluck, *Same Sex Marriage: The Overview; Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004, at A1.

<sup>61</sup> Stern, *Same-Sex Marriage and the Churches*, *supra* note 53, at 1.

<sup>62</sup> See, e.g., *NBC Nightly News* (NBC television broadcast Oct. 16, 2009); *CNN News* (CNN cable broadcast Oct. 16, 2009).

<sup>63</sup> See *supra* Part II.B (discussing proposed exemptions' applicability to religious objections based on grounds including race, religion, and sex).

<sup>64</sup> *NBC Nightly News*, *supra* note 62 (describing "painful call [by fiancée who had been refused solemnization] to her fiancé to break the news"); *CNN News*, *supra* note 62 (reporter stating to another reporter that the story "certainly must hit a nerve for you . . . given [that] . . . your mom and . . . dad [are] . . . an interracial couple").

Koppelman argues that “[n]ot all antigay views deny the personhood and equal citizenship of gay people.”<sup>65</sup> As an example, Koppelman offers *Peterson v. Hewlett-Packard Co.*, in which Mr. Peterson was fired from his job for violating the employer’s sexual orientation nondiscrimination policy.<sup>66</sup> As part of a workplace diversity campaign, Hewlett-Packard (HP) displayed posters of its employees with the caption, “Black . . . Blonde . . . Old . . . Gay . . . or . . . Hispanic,” along with another set of posters that presented the profiles of the same employees, along with the caption, “Diversity is Our Strength.”<sup>67</sup> In response, Peterson placed biblical verses on an overhead bin in his work cubicle, printed in lettering large enough to be visible to passersby, including the verse, “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them.”<sup>68</sup> Peterson testified that he had a religious duty to expose evil when confronted with sin,<sup>69</sup> and that he was motivated by a desire for gay persons to experience the joys of being saved.<sup>70</sup>

¶39 Addressing whether Peterson’s actions denied the personhood and equal citizenship of his gay co-workers, Koppelman asserts, “[c]ertainly Peterson’s views did not do that.”<sup>71</sup> Koppelman distinguishes Peterson’s motives from those characterizing racism, which he describes as “virulence of the rage it bespeaks and the hatred that it directs toward those who are its objects.”<sup>72</sup> Koppelman claims “the gay rights issue is different,” presumably because of the benevolent, non-subordinating motivations such as Peterson’s.<sup>73</sup> Peterson’s religious belief springs from an obligation to, as it is commonly phrased, “love the sinner but hate the sin.”<sup>74</sup> For Koppelman, this benevolent motivation distinguishes a racist refusal to marry an interracial couple, which Koppelman asserts is motivated by an invidious hatred and assumption of inferiority.<sup>75</sup> Rather than constituting an injury to equality or personhood, Koppelman instead characterizes Peterson’s sexual orientation-based religious objection as creating merely “a certain kind of insult.”<sup>76</sup>

#### A. *For Your Own Good*

¶40 The line of reasoning above reflects key misconceptions in the tension problematically referred to by some equal marriage opponents as a seemingly mutually exclusive election between “gay rights” and “religious rights.”<sup>77</sup> As an initial matter, the

<sup>65</sup> Koppelman, *supra* note 21, at 145.

<sup>66</sup> *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

<sup>67</sup> *Id.* at 601.

<sup>68</sup> *Id.* at 601–02 (quoting LEVITICUS 20:13).

<sup>69</sup> *Id.* at 601.

<sup>70</sup> *Id.* at 604; *see also* Gallagher, *supra* note 17, at 271 (“[R]espect for conscience . . . presumptively includes the right and duty to critique each other’s consciences, not to be free from painful or upsetting controversy about the nature of God . . . or the content of the moral good.”).

<sup>71</sup> Koppelman, *supra* note 21, at 145.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> On the use of the term “love the sinner, hate the sin,” *see* discussion *supra* note 20.

<sup>75</sup> Koppelman, *supra* note 21, at 145.

<sup>76</sup> *Id.* at 135.

<sup>77</sup> *See supra* note 6 and accompanying text (arguing that framing the issue as one of “religious rights” versus “gay rights” is misleading, as it overlooks the fact that many religious traditions support same-sex

above characterization of race discrimination is woefully incomplete, reflecting first generation race cases, but failing to capture contemporary understandings and forms of race discrimination. The notion of an actor with conscious, invidious racist intent is indeed paradigmatic: the laws at issue in *Brown v. Board of Education* and *Loving v. Virginia* certainly reflect the notion of a class of persons deemed “intrinsically inferior,” as well as the “virulen[ce] . . . and . . . hatred . . . direct[ed] toward those who are its objects.”<sup>78</sup> However, an extensive body of scholarship demonstrates that racism is far more prevalent and far less conscious than this paradigm suggests. Instead, race discrimination often stems from unconscious stereotyping and implicit bias.<sup>79</sup>

¶41 A related misconception is that discriminatory motive is necessarily (or even primarily) grounded in hatred. To the contrary, discrimination frequently may be justified in the discriminator’s mind as being for the greater good: women are better off at home or in certain types of jobs; it is better for people of all races not to intermarry. Whether marginalized because of race, sex, sexual orientation, disability, or other grounds, American history is replete with examples of discriminatory actions justified—frequently with benevolent sincerity—as being for the good of the group being discriminated against. In refusing to marry interracial couples, Keith Bardwell specifically disclaimed hostile intent, stating, “I’m not a racist” and adding that he has “piles and piles of black friends.”<sup>80</sup> As a quick search of popular culture attests, “I have black friends” is so widely recognized as a paean to racism that it serves as a basis for social commentary and stand-up routines.<sup>81</sup> A white person’s assertion of having “black friends” to prove her non-racist intent has traction precisely because it may genuinely reflect a lack of conscious racist animosity, even though it simultaneously flags unconscious bias.

¶42 It is neither necessary, nor perhaps possible, to disentangle unconscious bias and stereotyping from animosity fueled by hatred. The law appropriately holds discrimination actionable whether based in paternalism or motivated by benevolence. As the Supreme Court made clear in *Frontiero v. Richardson*, an early sex-based challenge, discrimination often coincides with a desire to save those deemed in need of protection.<sup>82</sup> In *Frontiero*, the Court explicitly rejected the notion that discrimination escapes liability simply because it is well-intentioned.<sup>83</sup> Invoking *Bradwell v. Illinois*, the infamous decision in which the Supreme Court had upheld a ban prohibiting women from practicing law, the *Frontiero* majority specifically refuted the notion that a presumptive

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marriage, many gay persons are religious, and many gay persons support religious liberty).

<sup>78</sup> Koppelman, *supra* note 21, at 135.

<sup>79</sup> See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199 (1995) (examining cognitive psychology findings that intentional discrimination model is too narrow to capture most discrimination, which is the result of implicit stereotyping or bias); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329–44 (1987) (critiquing the constitutional requirement of discriminatory intent where there is discriminatory impact, given that much contemporary racial discrimination is unconscious).

<sup>80</sup> See *Interracial Marriage Denied*, L.A. TIMES, Oct. 17, 2009, at 17.

<sup>81</sup> See, e.g., Jordan Carlos, Op-ed, *My Shtick? Being Black*, WASH. POST, Jan. 7, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/05/AR2007010501613.html>; Kyle Grooms, *Being the Black Friend*, <http://comedians.jokes.com/kyle-grooms/videos/kyle-grooms---being-the-black-friend> (last visited Sept. 9, 2010).

<sup>82</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (discussing *Bradwell v. Illinois*, 83 U.S. 130 (1873)).

<sup>83</sup> *Id.*



desire to protect women (which, in *Bradwell*, was based in part on religious belief) could be a reason to excuse discrimination: “Traditionally, such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>84</sup>

¶43 Were the Supreme Court to hold otherwise, the gamut of paternalistic stereotyping—whether related to race, sex, disability, sexual orientation, or other grounds—would simply be exonerated from liability. Returning briefly to *Peterson*, I accept that Peterson desired to save gay people. My point, though, is that cases such as *Frontiero* got it right. Neither religious nor presumptively benevolent or paternalistic motivations, such as Peterson’s desire to save gay people, justify discrimination. Nor do such motivations diminish the harm to personhood experienced by any gay co-workers who read his assertion that they should be put to death.

### B. *Gay Rights Are Different (Or Are They?): The Status-Conduct Conflation*

¶44 Some exemption proponents object that there remains a qualitative difference between benevolent (and arguably paternalistic) rationales for race and sex, on one hand, and sexual orientation, on the other. Paternalistic objections to women engaging in professional life, it may be argued, go to the heart of female identity itself. Myra Bradwell was deemed unfit to practice law due to the presumed “natural and proper timidity and delicacy which belongs to the female sex.”<sup>85</sup> What is impermissible in *Bradwell v. Illinois*, it could be argued, is that the Supreme Court determined, as a matter of law, that women are inherently different from, and subordinate to men; the law is essentializing (and ordering) difference. An exception permitting discrimination against gay people, some proponents argue, does not turn on essentialized notions of inferiority. Mr. Peterson’s sincere belief that we are all flawed sinners, it is argued, is inconsistent with an invidious assumption of inferiority. When it comes to gay people, then, there is no comparable harm from religiously-based discrimination because that which is deemed sinful is our conduct, rather than ourselves.

¶45 The assertion that religious objections to homosexuality reflect an opposition to same-sex sexual activity<sup>86</sup> rather than to homosexual persons is nothing more and nothing less than an invocation of the status-conduct distinction. As a religious matter, this distinction is a deep and meaningful one for many, demarcating salvation or sin. There is, in contrast, a well-developed body of law and scholarship analyzing the dangers of reliance upon the status-conduct distinction as a legal matter. The distinction between status and conduct is flawed because it is so porous. With two much-criticized exceptions (military regulations<sup>87</sup> and employment appearance regulations<sup>88</sup>), the law

<sup>84</sup> *Id.*

<sup>85</sup> *Bradwell v. Illinois*, 83 U.S. 130, 143 (1873) (Bradley, J., concurring).

<sup>86</sup> See, e.g., Gallagher, *supra* note 17, at 272 (characterizing sexual desire or orientation as a status, distinguishable from sexual behavior, and arguing that “the race analogy”—a status—“conceptually fails . . . because [acting on one’s sexual orientation] is behavior”).

<sup>87</sup> Ostensibly conduct-based regulations, which in actuality target status, such as religion and sexual orientation, have been upheld in the highly regimented environment of the military, when the asserted need is to preserve homogeneity to minimize conflict and preserve national security. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 506–07 (1986) (upholding military ban on wearing yarmulkes on duty on ground that “the military is, by necessity, a specialized society separate from civilian society” and “[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the

widely rejects the status-conduct distinction as a defense to claimed discrimination. In fact, a principal area in which the distinction has been raised—and rejected—is that of religious discrimination. As scholars have noted, sexual orientation and religion share a similarity: both are frequently defined in part by conduct that at once expresses and defines one’s identity and beliefs.<sup>89</sup> In its comment that “[a] tax on wearing yarmulkes is a tax on Jews,” the Supreme Court has succinctly encapsulated the problematic slipperiness of the status-conduct distinction, in which conduct may be a stand-in for status.<sup>90</sup> Federal statutory law likewise makes the impermissibility of a religious status-conduct elision explicit, specifically prohibiting discrimination based on “all aspects of religious observance and practice.”<sup>91</sup> Because religious conduct is so closely linked to one’s religious identity, a defense that the target was conduct (the wearing of a head-scarf, the taking of communion), rather than a particular religion, generally will be unavailing.<sup>92</sup>

¶46

The law has likewise widely rejected the status-conduct distinction with respect to sexual orientation. In the political asylum context, for example, courts have rejected government arguments that persecution had been based on same-sex sexual conduct rather than homosexual status; this is, as the Third Circuit stated, “a distinction without a

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civilian state by the First Amendment”) (internal quotations omitted); *Cook v. Gates*, 528 F.3d 42, 57–58 (1st Cir. 2008) (emphasizing deference to Congressional judgment in military affairs upholding military’s ban on gay service members), *cert. denied sub nom. Pietrangelo v. Gates* 129 S.Ct. 2763 (2009). There have also been pro-gay attempts to invoke the status-conduct distinction, which I have criticized. Taylor Flynn, *Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military’s Anti-Gay Policy*, 80 IOWA L. REV. 979 (1995) (arguing that, despite some lower court successes, challenges to military’s anti-gay ban should refrain from invoking status-conduct distinction).

<sup>88</sup> Courts have upheld ostensibly conduct-based appearance regulations in employment that target status, such as race and sex. See, e.g., *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984) (upholding prohibition on wearing clothing not associated with one’s designated birth sex, purportedly a form of “conduct,” but implicating gender identity); *Rogers v. Am. Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding prohibition on wearing braided hair styles, including corn rows, purportedly a form of “conduct,” but implicating racial identity). I and others have drawn on insights from critical race theory that the status-based nature of the regulations are unrecognized because they reflect majority race and gender stereotypes, and hence, are effectively rendered invisible because so ubiquitous. See, e.g., Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMP. POL. & CIV. RTS. L. REV. 465, 500–03 (2009) (arguing that challenges by transgender plaintiffs to dress codes are paradoxically often more successful than those by non-trans identified women because transgender status highlights stereotyped nature of prevailing gender norms); Barbara J. Flagg, “*Was Blind but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1992–1993) (discussing “transparency phenomenon,” in which, in the absence of a person of color, white persons’ race and the background norm of whiteness is experienced as invisible to them).

<sup>89</sup> See, e.g., Michael W. McConnell, *What Would It Mean to Have a “First Amendment” for Sexual Orientation?*, in *SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 234 (Saul M. Olyan & Martha C. Nussbaum eds., 1998).

<sup>90</sup> *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993). In contrast, as discussed *supra* at note 85, the Supreme Court has upheld a ban on wearing yarmulkes in the military, given the particular exigencies of military life. See *Goldman*, 475 U.S. at 506–07.

<sup>91</sup> 42 U.S.C. § 2000e(j) (2006).

<sup>92</sup> The same is true in other areas of the law as well. Concerning national origin discrimination, for example, the Equal Opportunity Employment Commission (EEOC) has expressed “particular concern” over denials of job opportunities that are conduct-based yet serve as a stand-in for national origin, including, tellingly, marriage to someone of a national origin group. 29 C.F.R. § 1606.1 (2008). Other examples set forth by the EEOC include membership in an organization seeking to promote the interests of national origin groups and attendance at schools or places of worship commonly associated with a national origin group. *Id.*

difference.”<sup>93</sup> Although the context concerned criminal sanction, which is particularly stigmatic, the Supreme Court in *Lawrence v. Texas* not only rejected the state’s attempt to portray Texas’ same-sex sodomy statute as “purport[ing] to do no more than prohibit a particular sexual act,”<sup>94</sup> but also went further, explicitly recognizing that such laws encourage additional status-based discrimination, with presumed government approval: “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination, both in the public and in the private spheres.”<sup>95</sup>

¶47 Consider again Mr. Peterson’s posting of the Bible verse; his actions demonstrate that gayness is so often conflated with gay sex that the synthesis of the two is barely perceptible. Peterson was presented with a list of identity (status) categories: “Black, Blonde, Old, Gay, Hispanic.” In what was likely an automatic response, he converted one of those categories (“gay”) to conduct (gay sex: “man lie[ing] with mankind”). Nor can Peterson be blamed for doing so. “*Who one is*” and “*whom one loves*” are often inextricably bound. While Peterson’s quotations were clearly from the Bible, neither the religious nor presumptively benevolent nature of his beliefs diminishes the injury experienced: it is difficult to imagine a clearer example of a denial of personhood than a statement by your co-worker that you will be put to death for falling in love, expressing that love as mature adults do, and perhaps building a family together.

¶48 A related difficulty with the attempt to distinguish the harm to gay persons based on the religious objector’s distinction between status and conduct is that the point of view of the discriminator is determinative of whether harm is experienced. Professor Koppelman urges us to consider Peterson’s experience, emphasizing the sincerity of Peterson’s belief and asserting that “Peterson was obviously an outlier.”<sup>96</sup> I do not doubt the former assertion, as Peterson was willing to jeopardize his twenty-year employment with HP.

¶49 I do question the latter. HP is headquartered in California, where, as its diversity campaign suggests, it applies nationwide the nondiscrimination mandates of its home state. This dispute, however, took place in Idaho, a state that has no sexual orientation antidiscrimination protections and that has both statutory and state constitutional DOMAs.<sup>97</sup> For Peterson’s gay coworkers, HP may be the one of the only (or perhaps the sole) employer in the state that not only has voluntarily adopted a sexual orientation

<sup>93</sup> *Maldonado v. Attorney Gen.*, 188 F. App’x 101, 104 (3d Cir. 2006) (whether injury is based on homosexual conduct or status is a distinction without a difference); *see also* *Karouni v. Gonzales*, 399 F.3d 1163, 1172–73 (9th Cir. 2005) (same, stating that there is “no appreciable difference” between the two).

<sup>94</sup> *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). *See also id.* at 583 (O’Connor, J., concurring) (“While . . . true that the law applies only to conduct, the conduct . . . is closely correlated with being homosexual . . . Texas’ sodomy law . . . is instead directed toward gay persons as a class.”).

<sup>95</sup> *Lawrence*, 539 U.S. at 575. For a more in-depth discussion of the role of the imprimatur of the state, *see infra* Part IV.

<sup>96</sup> Koppelman, *supra* note 21, at 144.

<sup>97</sup> *See, e.g.*, Human Rights Campaign, Idaho Non-Discrimination Law, <http://www.hrc.org/4165.htm> (last visited Sept. 9, 2010) (noting that “[n]o provision of Idaho law explicitly addresses discrimination based on sexual orientation” and that “no court has found [it] actionable under” other nondiscrimination provisions); Human Rights Campaign, Idaho State Law Listings, [http://www.hrc.org/laws\\_and\\_elections/state\\_law\\_listing.asp?state=Idaho&btnG.x=11&btnG.y=8](http://www.hrc.org/laws_and_elections/state_law_listing.asp?state=Idaho&btnG.x=11&btnG.y=8) (last visited Sept. 9, 2010) (“Idaho law and the state constitution both purport to ban marriage for same-sex couples. There are no other forms of relationship recognition for same-sex couples in state law or policies.”).

nondiscrimination policy, but also takes affirmative steps, such as the diversity campaign, to support its gay employees. In fact, a death threat, albeit biblical, could feel truly threatening in a state where, just four years after the Ninth Circuit's decision in *Peterson*, there was a spate of anti-gay bias crimes.<sup>98</sup>

¶50

The attempt to distinguish race from sexual orientation discrimination on the ground that religious objectors such as Peterson “love the sinner but hate the sin” is additionally flawed because it defines the nature of the harm according to the discriminator’s viewpoint. Reliance on religious belief as the sole measure of whether a certain kind of harm is experienced is, at the very least, highly questionable—it removes half of the equation. Moreover, it removes the half that many would consider to be the more relevant in evaluating the harm of discrimination: the experience of the person discriminated against. I am confident that most gay people would consider a refusal to provide them services related to their marriage an injury to personhood; surely, when assessing the nature of the harm, the experience of the class of persons harmed is not beside the point. Finally, the attempt to distinguish the harm by asserting that religious objectors do not consider gay people to be inherently inferior is itself problematic: as discussed above, it is at least possible that one may love the sinner and believe she is inferior—that her needs and desires are not as worthy as those of heterosexuals.

#### IV. SIGN-POSTING AND OTHER ICONS OF SECOND-CLASS CITIZENSHIP

¶51

As discussed in Part II, the proposed exemptions would permit a landlord to refuse to rent to a married same-sex couple, an employer to refuse to provide healthcare benefits to a same-sex spouse, and even a Justice of the Peace, employed by the government and paid by our tax dollars, to refuse to marry a same-sex couple.<sup>99</sup> In an attempt to minimize the hurt, some advocates suggest that objectors could post signs indicating their refusal to serve.<sup>100</sup> In this way, they claim, same-sex couples will be spared the additional wound resulting from a face-to-face refusal of service; they simply select another landlord, employer, or Justice of the Peace. Such sign-posting, I respond, is iconic of second-class citizenship, and for good reason: even combined with a voluntary adoption of an equal marriage statute, the state is carving out a “gay exception” to the panoply of applicable antidiscrimination laws. Lastly, I consider the related claim that the proposed exemptions merely facilitate equally balanced associational rights, and respond that they instead reflect an underlying subordination based on sexual orientation.

<sup>98</sup> See Jody May-Chang, *GLAAD Calls on Media to Investigate a Recent String of Anti-Gay Bias Crimes in Washington and Idaho*, PRIDEDEPOT.COM, Oct. 31, 2008, <http://www.pridepot.com/?p=738347> (describing call to investigate string of anti-gay bias crimes in Washington and Idaho in fall 2008).

<sup>99</sup> As discussed *supra* at note 4, some academic drafts include a narrow hardship exception that would require compliance where a party is “unable to obtain any similar services . . . elsewhere and . . . such inability . . . constitute a substantial hardship”; in what hopefully is meant to be a separate clause, it also provides that “no government official may refuse to solemnize a marriage if another government official is unable or unwilling to do so.” Stern, *supra* note 1, at 308. In proposals submitted to state legislatures of which I am aware, however, no hardship language was included. See discussion *supra* note 4.

<sup>100</sup> See, e.g., Douglas Laycock, *Afterword, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY*, *supra* note 3, at 189, 198–99. This was also discussed during the *Journal of Law and Social Policy*’s 2009 Symposium, which took place on November 12, 2009.

### A. Sign-Posting and the Imprimatur of the State

¶52 In the afterword to a book of collected works devoted to the subject of proposed exemptions to equal marriage laws, Douglas Laycock writes that to avoid “unfair surprise,” he “would have no objection to a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises.”<sup>101</sup> While presumably well-intentioned, the resemblance to earlier systems of segregation—whether “Whites only,” “Irish need not apply,” or “Male help wanted”—is, as Justice Blackmun noted in another gay rights context, “almost uncanny.”<sup>102</sup> For me, the lack of appreciation of the harm caused by such sign-posting is more than uncanny; it is unnerving. Needless to say, the resemblance to Jim Crow and other systems of segregation has not gone unnoticed by those who suggest sign-posting; as Laycock acknowledges, “In more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago.”<sup>103</sup> I find myself feeling personally shaken because these are proposals made by thoughtful, intelligent, well-meaning individuals.

¶53 Expressive rights are, of course, a double-edged sword. Particularly in a largely “gay-friendly” state (in which equal marriage statutes are most likely), some supporters of same-sex marriage may approve of sign-posting, as it provides a means of informing them which business establishments to support or boycott. Consider *Doe v. Reed*, in which the organization “Protect Marriage Washington,” a sponsor of a referendum to stop implementation of a state domestic partners law, argued that its members and other signatories had a right to keep their identities anonymous, asserting they would endure harassment and retaliation if their identities were revealed.<sup>104</sup> Interestingly, one example the *Reed* plaintiffs put forward to support their claim of harassment was the constitutionally protected tool of boycotting businesses, a safeguarded, expressive means to bring about social change.<sup>105</sup> Consider also the so-called “Mrs. Murphy” exemption to the Fair Housing Act, which provides that if a dwelling has four or fewer rental units and the owner lives in one of those units, the owner can discriminate but cannot advertise her discrimination.<sup>106</sup> Because Congress permits race discrimination under these circumstances, there is a strong argument that racist advertising should be permitted to alert consumers of the risk of discrimination or for boycotting purposes. Sign-posting similarly could be useful to same-sex marriage supporters, whether for purposes of

<sup>101</sup> Laycock, *supra* note 100, at 198.

<sup>102</sup> *Bowers v. Hardwick*, 478 U.S. 186, 211 n.5 (1986) (Blackmun, J., dissenting).

<sup>103</sup> Laycock, *supra* note 100, at 199.

<sup>104</sup> *Doe v. Reed*, No. 09-559, 2010 WL 2518466 (June 24, 2010) (upholding disclosure requirements as a facial matter).

<sup>105</sup> Protect Marriage Washington cited boycotts in California as an example of retaliation. *See, e.g.,* ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (denying preliminary injunction to remove from disclosure the names of putative class arguing members were subject to harassment, including boycotts, because of their support of Proposition 8, which amended California's constitution to define marriage as only between one man and one woman). During the racial civil rights movement, boycotting of businesses was a constitutionally protected tool to bring about social change. *See, e.g.,* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982) (holding that nonviolent boycott aimed at protesting racial discrimination is a legitimate form of petitioning activity that goes to core First Amendment values).

<sup>106</sup> 42 U.S.C. § 3603(b) (2006).

avoiding a face-to-face refusal to serve or as a means of identifying equal marriage opponents for social movement purposes.

¶54 While sign-posting has some positive uses for equal marriage supporters, its benefits, I believe, are outweighed by its dangers. Sign-posting is iconic of second-class citizenship. It bestows upon individual shop-keepers, landlords, and even government officials the permission to determine whom they will serve in the public realm. It does so with the sanction of law. And it does so by targeting a single, marginalized group.<sup>107</sup> Whether phrased obliquely in terms of marriage (“Services provided for traditional marriage only”) or conduct (“As a landlord, it violates my beliefs to facilitate homosexual conduct by providing housing to married same-sex couples”), the import of the message is the same: “No Gays Served Here.” Nor does sign-posting avoid the harm of a refusal to serve. To the contrary, even assuming sign-posting makes the injury more diffuse (as fewer same-sex couples presumably would seek that establishment’s services), dissemination of the discriminatory message becomes even more widespread, as it can be read by all passers-by.

¶55 Exemption proponents could argue that the state is not placing its approval on the refusal to serve; instead, the government is simply granting respect to individuals’ religious beliefs. The state-provided exemption, however, is the *sine qua non* for the sign-posting; it could not exist without the imprimatur of the state.<sup>108</sup> This is true even in the closest case, that in which a state voluntarily adopts an equal marriage statute in the absence of a directive from the judicial branch. Exemption proponents doubtless would argue that such a state could not possibly be sending a message of second class citizenship when voluntarily conferring the right to marry upon gay persons. Even though voluntary legislative action without a court order is a closer case, I would respond that the state is nonetheless giving the green light to discrimination. In pairing equal marriage rights with religious exemptions, the state simultaneously carves out a new authorization to discriminate, based on sexual orientation alone.

¶56 The symbolic and social meaning of such authorizations can have powerful, concrete ramifications in individuals’ lives. Consider the recently publicized hospital visitation rights case,<sup>109</sup> in which Florida’s DOMA<sup>110</sup> was used to justify overriding a

<sup>107</sup> As set forth *supra* at Parts II and III, it is not determinative that the exemption is phrased in terms of based on religious belief, rather than sexual orientation. As proponents’ writings demonstrate, and the likely outcome of adjudicated cases suggest, same-sex marriage is the impetus for the exemptions. Moreover, even if there are refusals on other grounds (e.g., sex, race, religion), “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

<sup>108</sup> I use the term “imprimatur” to connote a sign of approval by the state, with symbolic as well as potential legal ramifications. While the latter has great power on constitutional grounds (perhaps providing a finding of state action), the former, as discussed immediately below, can have equally powerful ramifications.

<sup>109</sup> The case came to national attention when President Obama issued a memo to his Health and Human Services agency, requiring all hospitals receiving Medicare and Medicaid money to honor all patients’ advance directives, including those designating who gets family visitation privileges. After signing the memo, President Obama called Langbehn personally to apologize. Kathleen Hennessey, *Obama Grants Gays More Rights: Most Hospitals Must Give Same-Sex Partners Visitation Privileges*, L.A. TIMES, Apr. 16, 2010, at 1.

<sup>110</sup> A “mini-DOMA” refers to state constitutional amendments or statutes, which, like their federal Defense of Marriage Act counterpart, 1 U.S.C. § 7 (1997), define marriage as between one man and one woman. Florida had adopted Proposition 2, which amended its constitution, as well as a statutory DOMA, FLA. STAT. ANN. § 741.212. See, e.g., DOMAWatch.org, Florida, <http://www.domawatch.org/stateissues/florida/index.html> (last visited Sept. 9, 2010).

power of attorney. Janice Langbehn, along with her children, was denied the right to see Janice's partner of over twenty years, who was dying from a fatal brain aneurysm.<sup>111</sup> A hospital employee asserted that the power of attorney was irrelevant because, as Florida's DOMA made clear, Janice was "in an antigay city and antigay state."<sup>112</sup> In effect, the employee "read" the state's DOMA as a license to discriminate.

¶57 It is this emboldening of citizens to discriminate that troubles me deeply. Like Florida's DOMA, the proposed exemptions present a similar or potentially greater risk: they specifically empower individuals to determine for themselves whether to extend equal treatment to lesbians and gay men in the public realm. Nor is the imprimatur limited to the statute itself. There may be a cascading effect that encourages additional claims for exemption as well as other acts of discrimination. Seeing the equivalent of "no gays served here" affixed throughout town, all with the permission of the state, may spur further acts of discrimination or violence.

¶58 Nor are such concerns a parade of horrors. As Justice O'Connor noted in her concurrence in *Lawrence v. Texas*, the fact of collateral effects resulting from a state imprimatur of discrimination has been acknowledged even by a discriminating state itself. While concededly concerning the greater social stigma of a criminal conviction, the state of Texas had stipulated in an earlier decision that its sodomy statute "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing."<sup>113</sup> During its relatively short life, the reach of *Bowers v. Hardwick*, the Supreme Court's decision upholding sodomy laws, was extensive, branding gay parents as "criminals" unfit for custody, prohibiting some gay people from practicing their profession, and requiring others to register as sex offenders.<sup>114</sup> And while perhaps impossible to prove, it is reasonable to assume, as Kendall Thomas does, that "homophobic laws lend the imprimatur of the state to the consonant homophobic violence undertaken by 'private' actors."<sup>115</sup>

### B. *Echoes of Wechsler, and a Refutation of Asserted Symmetry*

¶59 Some exemption proponents attempt to portray the conflict between religious objectors in the marketplace and gay persons seeking services as a symmetrical clash between competing associational rights. "The most important consequence of privatization," write Professors Dent and Koppelman, "is that members of both groups would be free to refuse to associate with the other."<sup>116</sup> The resemblance to Herbert Wechsler's critique of *Brown v. Board of Education* is striking. Wechsler framed the

<sup>111</sup> Complaint at 10, *Langbehn v. Jackson Mem'l Hosp.*, No. 08-21813 (S.D. Fla. June 25, 2008), available at <http://data.lambdalegal.org/pdf/legal/langbehn/langbehn-complaint-6-08.pdf>

<sup>112</sup> *Id.*

<sup>113</sup> *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring) (quoting *State v. Morales*, 826 S.W.2d 201, 203 (Tex.App. 1992)).

<sup>114</sup> *Id.* (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

<sup>115</sup> Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805 (1993).

<sup>116</sup> ANDREW KOPPELMAN & GEORGE W. DENT, MUST GAY RIGHTS CONFLICT WITH RELIGIOUS LIBERTY? 8 (forthcoming 2010). See also Koppelman, *supra* note 21, at 135 ("If [religious objectors] are 'constantly vulnerable' to forced association with gay people, will this not be 'a deep, intense and tangible hurt' to them?") (internal citations omitted).

issue at the heart of segregation as one in which “the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it.”<sup>117</sup>

¶60 Wechsler asserted that there was no principled basis for choosing between competing associational rights; as a result, he argued, *Brown* should not have disturbed the choice made by the states.<sup>118</sup> If faced with a challenge to the exemption proposals, advocates presumably would likewise depict the issue as an even-handed choice of associational rights, between which the state is free to choose. Importantly, however, this assumption ignores the subordination inherent in state-sponsored permission to discriminate against an unpopular minority. Wechsler famously commented that his colleague, Charles Hamilton Houston, “did not suffer more than I in knowing we had to go to Union Station to lunch together during the [Supreme Court’s] recess” due to the pervasive racial segregation in the District of Columbia.<sup>119</sup>

¶61 As many more notable than myself have responded, glaringly absent from Wechsler’s account is the message of inferiority inherent in segregation.<sup>120</sup> It also oddly overlooks a distinction at the heart of white supremacy: the unconcealed fact of a one-way ratchet, in which whites can patronize establishments designated for African Americans, but not the reverse. Even as early as 1896, the discriminatory purpose underlying assertedly equivalent associational rights in segregation was not lost on some; as Justice Harlan pointedly noted, “Every one knows . . . [t]he thing to accomplish was, *under the guise of giving equal accommodation* for whites and blacks, to compel the latter to keep to themselves.”<sup>121</sup> Inseverable from subordination are the process concerns: race discrimination represents a failure of the political process, in which the majority in effect usurped legislative power to confine the rights of an unpopular minority.<sup>122</sup> As Martha Nussbaum explains, “Wechsler is basically asking us to look at everyone as if they were placed as are the powerful.”<sup>123</sup>

¶62 Wechsler’s search for neutral principles failed because his baseline was not neutral—inconvenience is not equivalent to inferiority. In the context of the exemptions, proponents speculate that the number of religious objectors will be small, a portrayal

<sup>117</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

<sup>118</sup> *Id.* at 34–35.

<sup>119</sup> *Id.* at 34. For an in-depth chronicling of the ways in which Charles Hamilton Houston (who, because he was African American was barred from eating in the “whites-only” cafeteria in the U.S. Capitol) utilized his Harvard Law School education and role as the NAACP Litigation Director to train Thurgood Marshall and ultimately defeat Jim Crow laws, see *THE ROAD TO BROWN: THE UNTOLD STORY OF THE MAN WHO KILLED JIM CROW* (California Newsreel 1990).

<sup>120</sup> See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) (replying that “a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station”); see also Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 28–30 (2007); Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649 (2004).

<sup>121</sup> *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (emphasis added).

<sup>122</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 152–53, 161 (1980) (noting that judicial use of heightened scrutiny for suspect classifications is appropriate when democratic process has failed an unpopular minority).

<sup>123</sup> Nussbaum, *supra* note 120, at 30; see also Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 6 (1992) (“Existing distributions are treated as natural and exogenous to the legal system, and the normal role of government is thus seen as the ratification and protection of these distributions, based in part on existing preferences.”).



suggesting that objectors will be in the minority.<sup>124</sup> Particularly given that some objectors will no doubt be members of religious minorities, a claim of minority status by religious objectors has purchase, in part due to the unfortunate and widespread nature of religious discrimination. All groups are free to employ competing claims to minority status in their effort to create social change. On the issue of same-sex marriage, however, such a claim would be counterfactual: religiously-based opposition to same-sex marriage in the United States remains a view held by a majority of Americans.<sup>125</sup>

## V. CONCLUSION

¶63

It is worthy of a reminder that the question is not whether, in their private lives, religious objectors are required to buy the same-sex couple next door a wedding gift; instead, those seeking to discriminate offer their services to the general public, in most instances for profit. While on their face, the proposals could permit widespread discrimination on a multitude of protected bases, they appear to have been crafted to seize on cultural and religious anxiety and fears concerning same-sex marriage; the likely result, as-applied, would be to effectively eviscerate the hard-won sexual orientation protections in place, still in fewer than half of the states. Well-meaning, religiously-based intentions, moreover, do not palliate the harm. Instead, the proposed exemptions would create a societal framework in which lesbians, bisexuals, and gay men can be refused service in virtually all aspects of our lives, whether fundamental or mundane—from healthcare to housing, from employment to flower-buying—accomplished with the express permission of the state.

<sup>124</sup> See *supra* note 23 for assertions by Stern, *supra* note 1, at 308, and Koppelman, *supra* note 21, at 132–35, that the number of persons seeking exemptions is likely to be small.

<sup>125</sup> See, e.g., *supra* notes 27–29 and accompanying text (setting forth data to support the fact that majority opposition to equal marriage is the nationwide norm).